



## 22 CFR Part 41

[Public Notice: 11809]

RIN 1400-AE71

### Visas: Eligibility for Diplomatic Visa Issuance In the United States

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This rule is promulgated to add categories of nonimmigrants who may be issued nonimmigrant visas in the United States. This amendment will add a limited category of nonimmigrants who are born in the United States, but not subject to the jurisdiction thereof, to noncitizens maintaining A-1, A-2, C-2, C-3, G-1, G-3, G-4, or NATO nonimmigrant status and properly classifiable as such. The goal of these revisions is to codify the longstanding policy allowing such children to be issued diplomatic visas domestically to document their entitlement to A, C, G, or NATO nonimmigrant status.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Andrea Lage, Acting Senior Regulatory Coordinator, Visa Services, Bureau of Consular Affairs, 600 19th Street NW., Washington, DC 20522, 202-485-7586, [VisaRegs@state.gov](mailto:VisaRegs@state.gov).

### SUPPLEMENTARY INFORMATION:

#### What changes to 22 C.F.R 41.111 does the Department propose?

This rule amends the regulation identifying categories of nonimmigrants who may be issued nonimmigrant visas in the United States, by adding a limited category of nonimmigrants who are born in the United States, but not subject to the jurisdiction thereof, as they were born to certain nonimmigrants maintaining A-1, A-2, C-2, C-3, G-1, G-3, G-4, or NATO status and properly classifiable as such.

Prior to this amendment, the regulation identifying categories of noncitizens authorized to obtain diplomatic nonimmigrant visas in the United States limited issuance to noncitizens “currently maintaining status” and “properly classifiable” in the A, C-2, C-3, G, or NATO nonimmigrant visa categories, and required that the noncitizens have evidence that they have “been lawfully admitted in that status or have, after admission, had their classification changed to that status” and their “period of authorized stay in the United States in that status has not yet expired.” 22 CFR 41.111(b)(1). The Department of State determines whether a noncitizen is maintaining A or G status, the most common visa categories impacted for purposes of the present rule. (See e.g., 8 CFR 214.2(a)(1) and (g)(1), which provide that A and G nonimmigrants are admitted to the United States by the Department of Homeland Security for the “duration of the period for which the alien continues to be recognized by the Secretary of State as being entitled to that status.”) Noncitizens previously admitted to the United States who are seeking domestic visa issuance satisfy the requirement, set out in the amended regulation, that they have been “admitted [to the United States] in [A, C, G, or NATO] status” or have “had their classification changed to [A, C, G, or NATO] status” by providing documentation from the Department of Homeland Security, such as an I-94.

Children born in the United States to parents maintaining certain A or G nonimmigrant status and benefiting from diplomatic agent level immunities are not considered born subject to the jurisdiction of the United States and therefore do not acquire U.S. citizenship at birth under the Fourteenth Amendment. While not common, certain children born to parents in C-2, C-3 and NATO status also may not acquire U.S. citizenship at birth. This limited group of children would therefore be present in the United States without any documentation of their A, C-2, C-3, G or NATO nonimmigrant status. The Department’s policy is that such children should be issued documentation of their A, C-2, C-3, G or NATO nonimmigrant status, as provided for by law for derivatives of the principal nonimmigrant. This amendment will codify existing policy permitting diplomatic visa issuance in the United States to this limited group of children, whose

parents and other family members already are covered by the regulation describing issuance of diplomatic visas in the United States. This procedure is consistent with Department of State accreditation policy, which requires that derivative family members of those in A and G status possess a valid A or G visa.

In this rulemaking, the other categories of noncitizens eligible for visa issuance in the United States remain unchanged.

### **Regulatory Findings:**

#### **A. Administrative Procedure Act**

This rule is exempt from notice and comment as it involves a foreign affairs function of the United States. 5 U.S.C. 553(a).

An action will fall within the exception if it “clearly and directly” involves a foreign affairs function. *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 53 (D.D.C. 2020) (“to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations”). Cases that directly involve the conduct of foreign affairs include rules that regulate foreign diplomats in the United States. *E.B. et al v. Dep’t of State*, Civil Action 19-2856 at 11 (D.D.C. Feb. 4, 2022); *CAIR v. Trump*, 471 F. Supp. 3d 25, 54 (D.D.C. 2020). For example, in *City of N.Y. v. Permanent Mission of India to the U.N.*, the Second Circuit found that a State Department Federal Register Notice regarding exemptions from real property taxes imposed by state and local governments validly invoked the foreign affairs exemption because the regulation of “quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions [...] clearly and directly involves a ‘foreign affairs function’” *City of N.Y. v. Permanent Mission of India to the U.N.*, 618 F.3d 172, 202 (2d Cir. 2010).

This rule governs the issuance of visas to foreign diplomats and their family members in the United States and thus similarly implicates matters of diplomacy directly. It also is about a matter that is likely to have significant reciprocal consequences for the treatment of U.S.

diplomatic personnel overseas. In the absence of a rule governing the domestic issuance of visas to the children of foreign mission officials born within the United States, the mission members may be required to travel overseas and apply for a visa for their child before reentering the United States to continue their assignment. These children may also face difficulties in traveling within the United States if they do not possess a valid visa. This rule regulates the treatment of foreign missions to allow for regular diplomatic relations between countries, and directly invokes a foreign affairs function. Requiring foreign mission personnel and their children to travel overseas and apply for a new diplomatic visa similarly invites reciprocal requirements on U.S. diplomatic personnel, significantly affecting the ability of U.S. diplomatic personnel to engage with foreign partners and conduct the work of foreign relations if they must depart the host country to obtain a new visa for the child. The State Department is best positioned to make determinations about such matters of international reciprocity—a point acknowledged by several district courts to justify the foreign affairs exception for rules such as this. *See CAIR*, 471 F. Supp. 3d at 54 (exempting such rules from notice and comment rulemaking “makes sense” because “in the diplomatic context, agency action may be grounded in international reciprocity”).

B. Regulatory Flexibility Act/Executive Order 13272: Small Business

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or Tribal governments, or by the private sector. This rule does not require the Department to prepare a statement because it will not result in any such expenditure, nor will it significantly or uniquely affect small governments. This rule involves

visas, which involve individuals, and does not affect, state, local, or Tribal governments, or businesses.

D. Congressional Review Act of 1996

This rule is not a major rule as defined in 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

E. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These Executive Orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has examined this rule in light of Executive Order 13563 and has determined that the rulemaking is consistent with the guidance therein. The Department has reviewed this rulemaking to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866. This rule will ensure consistency with U.S. and international law, and the benefits of the clarity will benefit the foreign relations of the United States. There are no anticipated costs to the public associated with this rule. This rule has been forwarded to the Office of Information and Regulatory Affairs and has been designated not significant under Executive Order 12866.

F. Executive Orders 12372 and 13132

This regulation will not have substantial direct effect on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities

among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

G. Executive Order 12988

The Department has reviewed the rule considering sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

H. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

The Department has determined that this rulemaking will not have Tribal implications, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

I. Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

**List of Subjects in 22 CFR Part 41**

Aliens, Foreign officials, Immigration, Passports and Visas

Accordingly, for the reasons set forth in the preamble, 22 CFR part 41 is amended to read as follows:

**PART 41 VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE  
IMMIGRATION AND NATIONALITY ACT, AS AMENDED**

1. The authority citation for part 41 continues to read as follows:

**Authority:** 22 U.S.C. 2651a; 8 U.S.C. 1104; Pub. L. 105–277, 112 Stat. 2681–795 through 2681–801; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295).

2. Section 41.111 is amended by revising paragraph (b) to read as follows:

**§41.111 Authority to issue visa.**

\* \* \* \* \*

(b) *Issuance in the United States in certain cases.* The Deputy Assistant Secretary for Visa Services and such officers of the Department as the former may designate are authorized, in their discretion, to issue nonimmigrant visas, including diplomatic visas, in the United States, to:

(1) Qualified applicants who are currently maintaining status and are properly classifiable in the A, C-2, C-3, G or NATO category and intend to reenter the United States in that status after a temporary absence abroad and who also present evidence that:

(i) They have been lawfully admitted in that status or have, after admission, had their classification changed to that status; and

(ii) Their period of authorized stay in the United States in that status has not expired; and

(2) Children who are born in the United States, but who are not subject to the jurisdiction thereof because they are born to certain qualified individuals who are currently maintaining status and are properly classifiable in the A, C-2, C-3, G or NATO category.

(3) Other qualified applicants who:

(i) Are currently maintaining status in the E, H, I, L, O, or P nonimmigrant category;

(ii) Intend to reenter the United States in that status after a temporary absence abroad; and

(iii) Who also present evidence that:

(A) They were previously issued visas at a consular office abroad and admitted to the United States in the status which they are currently maintaining; and

(B) Their period of authorized admission in that status has not expired.

**Rena Bitter,**

*Assistant Secretary for Consular Affairs,*

*Department of State.*

**Billing Code: 4710-13**

